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Supreme Court of the United States

October Term, 1942

GENERAL SHALE PRODUCTS CORPORATION,
Petitioner,
vs.

STRUCK CONSTRUCTION COMPANY, and
SOUTHERN BRICK & TILE COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI and BRIEF IN SUPPORT

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To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:

The petitioner, General Shale Products Corporation, respectfully shows:

I. Summary Statement of Matter Involved.

This action arises under the anti-trust laws of the United States and concerns the interpretation of the Sherman Act, and the later Clayton and Robinson Patman Acts. No trial was had on the merits, but two basic questions of law were submitted to the District Court in pre-trial hearing, and those questions are presented for decision by this Court.

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The petitioner, General Shale Products Corporation, and the respondent, Southern Brick & Tile Company, are competing brick manufacturers. The respondent construction company, is engaged in the general construction business.

The petitioner and the respondent Southern Brick Company, competed for the sub-contract to supply the brick to be used in the erection of a slum clearance project by the Louisville (Kentucky) Municipal Housing Commission. At first, the bid of the petitioner for its product, Speedbrik, was low and it would be awarded the contract. The petitioner charges that in order to eliminate the petitioner, and to lessen competition, the Southern Brick Company entered into a plan with the Struck Construction Company, the general contractor erecting the buildings, whereby the price of the Brick Company's brick was reduced from its original bid of \$18.00 per thousand to an arbitrarily fixed figure of \$14.09 per thousand, to the Housing Commission.

As a result of this plan and agreement between the respondents, petitioner charges that it was damaged.

Before trial, two questions were raised as to whether the federal anti-trust laws were applicable at all, even if there were, (which respondents did not concede) a conspiracy between the two respondents to restrain trade and injure the petitioner. That is, the respondents contend, and the District Court concluded, that Acts of Parliament (and therefore of Congress) did not apply to the king or sovereign, (and therefore the Government) unless expressly mentioned by name. It follows, respondents say, that the Louisville Housing Commission, having been created for public purposes by an Act of the legislature of Kentucky, is endowed with the immunities of the sovereign, and the anti-trust laws of the United States forbidding combinations in restraint of trade or to injure a competitor have no application to a

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transaction between ordinary business corporations and the Commission.

On the other hand, it is the contention of the petitioner that the principle that the Sovereign is exempt from general laws unless named therein, has no application to the respondents, in their dealings with an agency of a State; furthermore, that the federal anti-trust laws expressly include an agency such as the Louisville Municipal Housing Commission, the anti-trust laws, 15 *United States Code*, Sec. 7 and 12, defining person to be:

"The word * * * 'person' * * * shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States * * * [or] * * * the laws of any State * * *."

and the Kentucky Statutes expressly declare the Housing Commission to be a "body corporate".

Petitioner further contends that under a long line of decisions both by this Court and the Court of Appeals of Kentucky, when the sovereign grants to its agencies or corporations the power to sue and be sued, it thereby impliedly strips from that agency or corporation the attributes and immunities of the sovereign. The Kentucky legislature not having endowed the Housing Commission with any of the attributes of sovereignty, transactions with it are not exempt from the operation of the Federal anti-trust laws.

The second basic question of law presented by this case, is whether the Clayton Act, as amended by the Robinson Patman Act, has taken "construction" contracts, and the construction industry, from under the provisions of the general terms of the Sherman Act forbidding all combinations and contracts to lessen competition; and, if a "construction" contract is not within the scope of the present

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anti-trust laws, whether the transaction in the case at bar constitutes a "construction" contract or a "sale" of brick, as a matter of law.

The respondents contend that since the brick was supplied for use in the construction of buildings, there was no technical "sale" and that the anti-trust laws, as amended by the Robinson Patman Act permit the procedure followed here.

Our contention is that the Sherman Act, 15 U. S. Code, Sec. 1, declares every contract, combination or conspiracy in restraint of trade to be illegal, and gives a remedy to anyone injured thereby.

The Clayton Act, as amended by the Robinson Patman Act, does not repeal this general prohibition against monopolistic combinations, but does define (among other things) certain legal and illegal price-fixing practices. The dividing line is that bona fide price-fixing or price cutting based *only* on due allowance for differences in the cost of *manufacture, sale or delivery*, are declared to be legal (15 U. S. Code, Sec. 13) but those which are arbitrarily fixed, to eliminate a competitor, are not justified by the Robinson-Patman amendment, and that the anti-trust acts do apply to so-called "construction" contracts and the construction industry in the United States.

The District Court decided that the Louisville Housing Commission came within the principle that the Sovereign was exempt from the general laws and dismissed the complaint.

The Court of Appeals expressly refrained from passing upon this question, and not having declared against the principle, the decision of the District Court stands.

The District Court also determined that the brick was furnished as part of a "construction" contract, as distinguished from a "sale" of brick, and that the anti-trust law

had no application for this reason. The Court of Appeals placed its decision affirming the dismissal on this basis.

II. Basis of Jurisdiction.

Jurisdiction is invoked under Sec. 347, Title 28, United States Code, authorizing review of final decisions of the Circuit Courts of Appeals by writ of certiorari.

The opinion and judgment of the Circuit Court of Appeals were filed December 2nd, 1942, and no motion for rehearing was filed.

III. Questions Presented.

Two basic questions are presented by this record:

First: Are the anti-trust laws of the United States applicable to transactions between business corporations and the Louisville Municipal Housing Commission, a creature of the laws of Kentucky?

Second: Are the anti-trust laws of the United States applicable to agreements or contracts in the "construction" industry, or for the construction of buildings, since the Robinson-Patman amendment? If not applicable to "construction" contracts, is the transaction at bar a "construction" contract, or for the "sale" of brick within the meaning of the anti-trust laws?

We respectfully contend that the Federal anti-trust laws do apply to transactions with the Housing Commission, and that the construction industry and construction contracts are amenable to the anti-trust laws, although the lower courts decided the contrary.

IV. Reasons for Allowance of Writ.

If this decision stands, it furnishes a precedent for greatly narrowing the scope of the anti-trust laws, if in practical effect it does not emasculate them entirely.

As to the conclusion that the transaction between respondents and the Housing Commission is exempt because it is a governmental agency, it may be pointed out that the only connection between the Housing Commission and the Federal Government is that the Housing Commission borrows funds from the United States Housing Authority. (Stipulation, Rec. p. 84). If this entitles the Commission to the immunities of the sovereign United States and exempts it from the anti-trust laws, then it might be hard to find a corporation, firm or individual today which is not in this sense a sovereign, the right to borrow from the United States or its agencies not being confined to wheat, corn and cotton growers, to distressed farmers and home owners, or to banks and other corporations approved by the Reconstruction Finance Corporation, the Treasury Department or Defense agencies of all kinds.

Furthermore, such a decision is contrary to a long line of decisions by both this Court and the Court of Appeals of Kentucky to the effect that an agency or corporation created under the laws of the United States, or the laws of a State, which is given the power to sue and be sued, is thereby impliedly stripped of its sovereign immunities. The Kentucky legislature has not endowed the Housing Commission with any of the attributes of sovereignty as is more fully discussed in our brief filed herewith.

Finally, such a determination is contrary to the express provisions of the anti-trust laws themselves, which state:

"The word 'person' * * * shall be deemed to include corporations and associations existing un-

der or authorized by the laws of either the United States * * * [or] * * * the laws of any state * * *." 15 *U. S. Code*, Sec. 7 and 12.

The Kentucky statutes declare the Housing Commission to be a "body corporate" under the laws of Kentucky.

And the other conclusion—that the anti-trust laws do not apply because the brick was furnished under a "construction" contract, as distinguished from a "sale" contract,—has far-reaching practical results.

If the stamp of approval is placed upon the decision in this case, the entire construction industry in the United States will have the means of removing itself from the operation of the anti-trust laws. Any conspirator, group or trust desiring to eliminate competition in the construction or building industry would be free to suggest to prospective builders of homes, factories, plants or other buildings, that the same method of procedure be followed as in the case at bar. The same reservation could be made in the general contract as was made by the Housing Commission, i.e., that the owner reserve the right to designate the brick, the lumber, the plumbing, the lighting or other article, and provide that the general contract price should be adjusted exactly in proportion to the actual price of the brick, lumber, plumbing or lighting designated.

The conspirator may then freely furnish his product to the general contractor at any price sufficiently low to eliminate the competitor, for he is not "selling" anything.

This agreement will not be objectionable to the home or factory owner for whom the building is being erected, for he, like the Housing Commission, will be glad to secure the

benefit of the cut rate; it will not be objectionable to the contractor for his profits are not affected, the contract price sliding *exactly* as the price of the designated article, just as in the case at bar the general contract price moved up or down *exactly* with the brick price. And the price-cutting conspirator will be free to use the method, for this decision authorizes him to make any such agreements because he is not "selling", and the homeowner is not "purchasing", bricks or lumber or plumbing, but a completed house or building.

It is respectfully submitted that not only is the decision at bar erroneous and contrary to previous constructions of the anti-trust laws, but its effect will be so great in the extensive construction and building industry in the United States that before the principles enunciated by the Courts below become the law of the land this Court should examine into and consider the far-reaching practical effects that will result.

To avoid repetition, we shall not here further enlarge the arguments and reasons for allowing a writ of certiorari since they are elaborated upon in the Brief attached hereto.

V. Prayer for Writ.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and proceedings of said court in cause number 9113 on its docket, wherein petitioner is appellant and Struck Construction Company and Southern Brick & Tile Company are appellees, to the end that said cause may be reviewed and determined by this Court; that the judgment of said Circuit Court of Appeals

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be reversed and for such other relief as this Court may deem proper.

General Shale Products Corporation,
Petitioner,

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